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ENVIRONMENTAL PROTECTION

LAND USE MANAGEMENT AND COMPLIANCE

LAND USE REGULATION

Flood Hazard Area Control rules

Proposed Readoption: N.J.A.C. 7:13

Authorized by: Bradley M. Campbell, Commissioner, Department of Environmental Protection

Authority: N.J.S.A. 58:16A-50 et seq., N.J.S.A. 58:10A-1 et seq., N.J.S.A. 58:11A-1 et seq. and
N.J.S.A. 13:1D-1 et seq.

Calendar Reference: See Summary below for explanation of exception to calendar requirement

DEP Docket Number: 21-05-06/523

Proposal Number: _____

A public hearing concerning the proposal will be held from 1:00 P.M. to close of comments on:

August 17, 2005
Public Hearing Room, 1st Floor East
Department of Environmental Protection
401 East State Street
Trenton, New Jersey

Submit written comments on this readoption by September 30, 2005, to:

Gary J. Brower, Esq.
Attn.: DEP Docket No. 21-05-06/523
Office of Legal Affairs
Department of Environmental Protection
PO Box 402
Trenton, New Jersey 08625-0402

The Department of Environmental Protection (Department) requests that commenters submit comments on disk or CD as well as on paper. Submission of a disk or CD is not a requirement. The Department prefers Microsoft Word 6.0 or above. MacIntosh formats should

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not be used. Each comment should be identified by the applicable N.J.A.C. citation, with the commenter's name and affiliation following the comment.

A copy of the proposal is available on paper or on disk by calling the Department at (609) 633-7021. The rule proposal can also be found at the Department's website (www.nj.gov/dep).

The agency proposal follows:

Summary

In accordance with the "sunset" provisions of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., the Flood Hazard Area Control rules at N.J.A.C. 7:13 will expire on June 30, 2005. The Department of Environmental Protection (the Department) has reviewed these rules and determined that they continue to be necessary, reasonable and proper for the purposes for which they were originally promulgated. The Department is proposing to readopt the rules without amendments. As the Department has provided a 60-day comment period on this notice of proposal, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

The Flood Hazard Area Control rules implement the New Jersey Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq., through which the Department executes the directive to "adopt land use regulations for the flood hazard area, to control stream encroachments, to coordinate effectively the development, dissemination, and use of information on floods and flood damages that may be available, to authorize the delegation of certain administrative and enforcement functions to county governing bodies and to integrate the flood control activities of the municipal, county, State and Federal Governments." (N.J.S.A. 58:16A-50b).

New Jersey's geography and location along the Atlantic coastline subject the State to frequent tidal and fluvial flooding. Since the State's earliest settlements were established along navigable waters, many older communities lie partially or completely within flood hazard areas. Over time, the indiscriminant development of land within these flood hazard areas has led to increased public safety risks and adverse environmental impacts. In many cases, the land along streams and rivers that would normally be occupied by floodwaters during a flood has been filled in by development, thereby forcing floodwaters to go elsewhere during storm events. It has been proven historically, and can be demonstrated mathematically, that this displacement of natural flood storage volume increases the depth and velocity of flooding and expands the areas subject to flooding. Greater flooding leads to greater public safety hazards as well as increased loss of property. Furthermore, higher flood flows in channels increase the potential for erosion, stream bank failure and sediment deposition, which adversely impacts fishery resources and other aquatic life. In response to these threats, the Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 et seq., was adopted, and the Flood Hazard Area Control rules at N.J.A.C. 7:13 were subsequently promulgated to implement the Act's directive to regulate and/or restrict development as appropriate to facilitate the protection of public safety and the environment by establishing basic construction standards for activities within flood hazard areas and along riparian corridors.

The Department's experience in administering the Flood Hazard Area Control rules, including experiences in more recent storm events such as Hurricane Isabel, has demonstrated the need to analyze the current rules to determine appropriate amendments. The Department has previously been granted extensions of the expiration date of the chapter to allow it to conduct a number of public outreach sessions (see 32 N.J.R. 1253(b), 33 N.J.R. 553(c), 33 N.J.R. 2641(a),

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34 N.J.R. 2802(c) and 36 N.J.R. 886(a)). At this time, the Department is considering amendment of various provisions to better protect public health and property and anticipates proposing amendments reflecting its analysis and the public outreach conducted. However, given the number of changes that have been determined to be necessary to address the issues that have been identified, the Department was unable to finalize a proposal to repeal the existing Flood Hazard Area Control rules and replace them with comprehensive new rules prior to the current expiration date of June 30, 2005. Accordingly, the Department is proposing to readopt the existing chapter without amendments in order to prevent the chapter from expiring.

Description of the Subchapters

Subchapter 1, General Provisions, includes the purpose of the chapter, definitions of terms, applicability of the chapter to various development activities, contact information, a description of the interaction of the rules with other State statutes, as well as construction and severability provisions.

Subchapter 2, Project Standards, includes basic design and construction standards for the placement of fill and structures within flood hazard areas. Specific requirements are listed which ensure the construction of safe, flood-resistant structures that do not exacerbate flooding by displacing excessive flood storage. Standards regarding safe access to and from public buildings and residences during floods are also included, as well as specific guidelines for the construction of bridges, culverts and low dams. Prohibited uses are listed as well as the methods for determining the regulatory extent of flooding. Certain environmental standards are also included for activities which affect channels and surface waters, such as stream cleanings, channel modifications and the construction of bridges and culverts.

Subchapter 3, General Environmental Standards, includes specific requirements for development within and along channels, which limit the removal of near-stream vegetation and establish restrictions on impacts to fishery resources and other aquatic biota. This subchapter also establishes requirements for the protection of threatened and endangered species in regulated areas and sets forth standards for mitigating the hazards of exposing acid-producing deposits during construction.

Subchapter 4, Application Procedure for Stream Encroachment Permits, describes the submittal and review of stream encroachment permit applications. Detailed information regarding the application materials to be submitted, public notice requirements and pre-application conferences are included, as well as a description of how applications will be reviewed by the Department. Provisions for certain delegated and expedited review procedures are included, as well as procedures for obtaining emergency permits and modifications to previously approved permits. The subchapter also provides for the appeal of a decision by an applicant and the granting of waivers for unique cases where strict compliance with the rules would create an undue hardship on an applicant.

Subchapter 5, Implementation, includes penalties and provisions to delegate review authority to counties and to create county water resources associations. Provisions to ensure consistency with other statutory and regulatory requirements are also included.

Subchapter 6 is reserved.

Subchapter 7, Delineated Floodways, is a comprehensive list of all segments of New Jersey's watercourses for which the Department has delineated and adopted flood hazard area and/or floodway limits.

Social Impact

The proposed readoption is expected to continue the social benefits derived from the existing rules, which facilitate the protection of public safety and the environment by establishing basic construction standards for activities within flood hazard areas and along riparian corridors. The major social impact of the rules will continue to be the benefits derived from the reduced risk of flood damage from improper and unsafe construction as well as the environmental benefits of healthy riparian corridors, which leads to cleaner surface waters and groundwater.

Economic Impact

The proposed readoption is expected to continue the generally beneficial economic impact of the existing rules. The existing design and construction standards of the rules are necessary to preserve public safety and will continue to prevent and minimize the substantial economic impacts that can result from flooding. Each year, New Jersey sustains millions of dollars of flood damage, the majority of which is borne by taxpayers through relief measures as well as through increased insurance premiums. The standards of the rules are designed to reduce the potential for loss of life and property, which provides a positive economic benefit. Improper construction in flood hazard areas can subject housing, businesses and public buildings to flood damage and other related problems many years after construction, leaving home and business owners, or taxpayers, to pay for correction and remediation rather than the original developer. Therefore, the rules are expected to have a positive economic impact by reducing long-term costs related to disaster assistance, infrastructure repair and insurance claims.

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Maintaining a Statewide minimum standard for design and construction within flood hazard areas also results in a positive economic impact. Without Statewide regulations governing minimum standards, each individual municipality would have its own standards, or would have no standards whatsoever beyond the minimum requirements established by the Uniform Construction Code and the National Flood Insurance Program. By providing a Statewide standard, the system of approval becomes more predictable for individuals designing and constructing within flood hazard areas and provides the highest level of protection for the public.

Notwithstanding the above, compliance with the requirements of these rules will often require a person seeking to construct within a flood hazard area to incur consultant costs related to site evaluation, design and construction. The exact costs will depend upon conditions at the particular site and the magnitude of the proposed development. Compliance with the rules may also reduce the amount of development that can occur on a site and therefore reduce the expected monetary return that a developer would otherwise prefer to make on an investment. The requirements of the rules also cause some development to relocate outside the flood hazard area completely. This does not necessarily impose costs on the regulated community; instead it is likely to reduce the profit margin on potential development of the flood hazard area. It is the Department's opinion that this impact is outweighed by the increased public safety and reduced property damage and need for flood relief that results from implementing these rules.

The administrative and technical requirements of the rules that are most closely related to the cost of development, such as costs associated with site evaluation, engineering costs associated with the actual design of the project and costs associated with the construction of the project, will remain the same as under the existing rules. Persons affected by these rules include

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property owners situated in the flood hazard area and along riparian corridors. Property owners outside these areas are only incidentally affected by the rules, in as much as reduced flood relief efforts will lower taxes while restrictions on land uses in flood hazard areas may increase property values outside flood hazard areas. These rules also increase the cost of design and construction for roadways (both public and private) as well as the life span of such roadways and reduce flood damage potential. Therefore, while the rules do place some additional burden on local governments and developers proposing roads and buildings in flood hazard areas, the added cost of compliance is necessary and appropriate to offset loss of life and property.

In summary, the Department anticipates that the economic benefits resulting from the proper oversight of construction in flood hazard areas as provided by these rules will continue to outweigh the added costs to persons proposing such construction.

Environmental Impact

The proposed readoption is expected to continue the environmental benefits derived from the existing rules, which set forth strict environmental standards designed to minimize the adverse impacts that development may cause to the State's surface waters, riparian corridors and aquatic biota. Healthy vegetation adjacent to surface waters is essential for maintaining bank stability and water quality. The indiscriminate disturbance of such vegetation destabilizes channels, which leads to increased erosion and sedimentation that exacerbates the intensity and frequency of flooding. The loss of vegetation adjacent to channels also reduces filtration of stormwater runoff and thus degrades the quality of surface waters. Such impacts adversely affect the health and habitat of fish and wildlife, which depend upon clean surface waters, and therefore

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disrupt the ecological balance that is necessary for life. Humans are ultimately affected by this imbalance, since clean water is essential for all life. The existing rules establish a number of comprehensive standards designed to protect these resources, the environmental benefits of which will be continued upon readoption.

Federal Standards Statement

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. (P.L. 1995, c.65) require State agencies which adopt, readopt or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a Federal standards analysis.

The Department's authority for regulating development within flood hazard areas and riparian corridors comes solely from State statute, specifically N.J.S.A. 58:16A-50 et seq., N.J.S.A. 58:10A-1 et seq., N.J.S.A. 58:11A-1 et seq. and N.J.S.A. 13:1D-1 et seq. The Flood Hazard Area Control rules are not promulgated under the authority of, or in order to implement, comply with, or participate in any program established under Federal law or under a State statute that incorporates or refers to Federal laws, Federal standards or Federal requirements.

The existing chapter both provides for the delineation of flood hazard areas and floodway limits and also sets forth design and construction standards for activities within these areas and adjacent to surface waters. The delineation portion of the rules has a comparable Federal counterpart as discussed below, but the regulatory component does not.

The Federal Emergency Management Agency (FEMA) delineates some flood hazard areas in the State for the purposes of the National Flood Insurance Program (NFIP). However, there is no Federal agency or program that directly regulates activities in flood hazard areas based on their potential flooding impacts. The Code of Federal Regulations, Title 44 Part 60,

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requires municipalities that participate in the NFIP to adopt certain flood hazard reduction standards for construction and development in 100-year flood plains. However, a community's participation in the NFIP is voluntary, and FEMA does not otherwise regulate specific land uses in flood hazard areas. Furthermore, the Federal flood reduction standards are administered by local governments. In addition, the Federal standards do not restrict flood storage volume displacement as does N.J.A.C. 7:13. Whereas the Federal regulations are designed primarily to protect structures from the effects of flooding, N.J.A.C. 7:13 is also concerned with the effects of development on flooding itself.

The delineation portion of the State program is comparable to the FEMA flood hazard area delineation program. In fact, the Flood Hazard Area Control Act, at N.J.S.A. 58:16A-52b, requires the Department to make floodway delineations identical to the floodway delineations approved by FEMA wherever practicable. The Department does this as regards floodways. However, in delineating flood hazard areas, the Department adds a factor of safety, which makes State delineations more stringent than FEMA's 100-year flood delineations. This is appropriate for several reasons. First, New Jersey is unique in having the highest population density in the nation, which gives rise to heavy development pressure. It is therefore important that the State's flood hazard area delineations include a factor of safety to account for the effects of future development on flood elevations. Second, in light of recent flooding problems across the State, it is appropriate for the Department to take a conservative approach on flood mapping, since the actual flood hazard area limits can sometimes exceed the mapped limits, as did occur in some areas along the Delaware River earlier this year. According to recent National Flood Insurance Program statistics, New Jersey has the fifth highest number of insured properties in the nation, as well as the third highest number of flood insurance claims nationally in 2004. A significant

number of these insurance claims were paid out on properties that lie outside the FEMA-delineated flood hazard area, indicating that the larger flood maps used by New Jersey more accurately reflect the actual limits of flooding. Finally, since the Department not only uses its own delineations, but also accepts and verifies delineations performed by applicants on a site-by-site basis, it is important to retain a factor of safety to protect against any possible errors.

The adoption of more stringent delineation will place within mapped flood hazard areas additional properties that are most likely to be inundated in a flood, thus subjecting more properties to the Department's jurisdiction than would occur if FEMA mapping were utilized. As a result, a small number of additional properties in the State are subject to the impacts described in the economic impact analysis above, including a reduction in the level and scope of development than might otherwise occur if this chapter did not exist. However, as a result of these larger flood hazard areas and the subsequent design and construction standards that are applied to these additional properties, future damages from flooding will be reduced in these areas, thus protecting public health and saving both private and public funds. The Department has therefore determined that the benefits achieved by taking this more conservative approach and protecting life and property outweigh the costs incurred as a result of applying flood delineation standards in excess of the Federal standard.

Jobs Impact

The Flood Hazard Area Control rules play a role in the planning and construction of residential, commercial and industrial development in the State. As a result, the implementation of the rules may lead to some jobs for consultants, engineers and attorneys for projects seeking approval to construct in flood hazard areas. Since the rules establish various restrictions and

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prohibitions on construction activities, it is reasonable to assume that more construction would occur in flood hazard areas if these rules did not exist. Therefore, the rules may have some negative impact on jobs in construction as some projects either may not be allowed or will need to be on a smaller scale than would otherwise be allowed if the rules were not in place. However, it is not possible to determine whether the implementation of these rules has actually reduced the overall level of development in the State, and subsequently reduced the overall number of jobs in the State, since development that might have otherwise occurred in flood hazard areas may simply have been relocated to safer areas within the State. Furthermore, it is likely that investors would be more attracted to invest in areas that are well planned to reduce flood damage potential and the subsequent loss of life and property that results from inappropriate construction in flood hazard areas. The rules have therefore likely increased the value of land outside flood hazard areas, thus generating more investment potential and job opportunities related to construction in these areas. Given the above, the rules do not appear to have decreased the amount of construction in New Jersey, although the rules may have caused some displacement of construction to areas farther from waterways. Therefore, the Department does not believe that the implementation of the Flood Hazard Area Control rules has created a significant impact on jobs.

Agriculture Industry Impact

Pursuant to N.J.S.A. 52:14B-4, the Department has evaluated this rulemaking to determine the nature and extent of the impact of the proposed readoption of the rules on the agriculture industry. The readoption of the Flood Hazard Area Control rules will have a positive impact on agriculture since it will continue the benefits of the existing rules by minimizing flood

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damage and will also encourage responsible environmental practices on farms in areas that are subject to flooding. The benefits of reduced flood-damage potential afforded by the implementation of these rules are seen by all landowners in flood hazard areas, including farmers, since the inappropriate development of flood hazard areas causes the frequency and extent of flooding to be exacerbated. The Department does not anticipate any other impact on the agriculture industry from the proposed readoption.

Regulatory Flexibility Analysis

In accordance with the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Department has reviewed the proposed readoption for reporting, recordkeeping or other compliance requirements on small businesses. Any person who proposes to construct within flood hazard areas or riparian corridors must strictly comply with the requirements of this chapter. The rules do not require small businesses, as defined by N.J.S.A. 52:14B-16 et seq., to do any reporting or recordkeeping or to meet any other compliance requirements beyond the initial design and construction of a new building for a small business if the business is proposed to be located within a regulated area. The costs to small businesses are the same as to any person or entity seeking to construct within flood hazard areas or riparian corridors, including engineering and environmental consultant fees, as well as permit application fees. The actual costs vary depending upon the size of the development and the particular site conditions.

These rules do not provide any lesser requirements or exemptions for small businesses because the overall purpose of the rules is to protect the public health, safety and the environment from improper construction within flood hazard areas and riparian corridors. Lessening the requirements could result in an increased threat to public health, safety and the

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environment. Since the rules regulate based on flooding and environmental impacts, they will generally have the same impact on a small business as on any other person proposing development in flood hazard areas. Because the minimization of flooding is important to all residents of the State, and the design and construction criteria of the rules are necessary to maintain appropriate protection from flooding danger and damage, no lesser requirements for small businesses are provided.

Smart Growth Impact

Executive Order No. 4 (2002) requires State agencies that adopt, amend or repeal State regulations to include in the rulemaking document a Smart Growth Impact Statement that describes the impact of the proposed rule on the achievement of smart growth and implementation of the New Jersey State Development and Redevelopment Plan (State Plan). The Department has evaluated this rulemaking to determine the nature and extent of the proposed rule readoption's impact on smart growth and the implementation of the State Plan.

The proposed readoption is consistent with the law and policy of New Jersey to promote smart growth and to reduce the negative effects of sprawl and disinvestment in older communities, as described in Executive Order 4 (2002). Executive Order 4 states that New Jersey requires sound and integrated planning, as well as coordination with local planning, in order to conserve natural resources, revitalize urban centers, protect the environment and provide needed housing and adequate public services, all at a reasonable cost, and all while promoting beneficial economic growth, development and renewal. The Executive Order also encourages redevelopment, repair, rehabilitation and replacement of existing facilities. These goals are reflected in a number of existing provisions that will be continued upon readoption.

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The readoption of these rules promotes State Plan General Policy 4, Prevention of Water Pollution, and General Policy 5, Water Quality/Individual and Community On-site Wastewater Treatment Systems. Without the regulatory framework to establish design and construction standards within flood hazard areas and riparian corridors, there would be no method to ensure that developments are constructed to any minimum criteria that is protective of public safety and the environment.

The State Plan policy also identifies the protection and enhancement of water resources through coordinated planning efforts aimed at reducing sources of pollution and other adverse effects of development, encouraging designs in hazard-free areas that will protect the natural function of stream and wetland systems, and optimizing sustainable resource use. The existing rules establish provisions to achieve this State Plan policy, including stringent design and construction standards for development, which protect natural waterways, often reducing the size and impacts of development. Furthermore, by limiting flood storage displacement in flood hazard areas and preventing obstructions in floodways, the rules encourage development to relocate outside flood hazard areas. The inclusion of specific requirements for development in channels and riparian corridors discourages incompatible development of these environmentally sensitive features, and therefore encourages development outside these areas as well. This is consistent with the goals of protecting the quality of the environment, encouraging growth in areas suitable for growth, and promoting reinvestment in older communities where such features are not present.

The rules further advance the State's Smart Growth policies by providing clear technical standards and guidance to the regulated public. This promotes a more predictable and expeditious review and approval processes. Furthermore, a number of exemptions and design

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standards are geared to facilitate the rehabilitation and reconstruction of existing structures in flood hazard areas.

Therefore, the proposed rules comport with the goals of smart growth and implementation of the State Plan as required in Executive Order No. 4

Full text of the proposed readoption may be found in the New Jersey Administrative Code at N.J.A.C. 7:13.

Based on consultation with staff, I hereby certify that the above statements, including the Federal Standards statement addressing the requirements of Executive Order 27(1994), permits the public to understand accurately and plainly the purposes and expected consequences of this proposed readoption. I hereby authorize this proposed readoption.

Date

Bradley M. Campbell, Commissioner
Department of Environmental Protection